U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 24 October 2005

CASE NO.: 2004-BLA-05573

In the Matter of

GENE B. JOHNSON
Claimant

v.

FREEMAN FUELS OF KENTUCKY, INC.
Employer

and

OLD REPUBLIC INSURANCE CO.
Carrier

and

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS
Party-in-Interest

Appearances:

Claimant, Pro Se

Lois A. Kitts, Esquire
For Employer

Before: JANICE K. BULLARD
Administrative Law Judge

DECISION AND ORDER DENYING BENEFITS ON SUBSEQUENT CLAIM

This proceeding arises from a claim for benefits under the Black Lung Benefits Act, 30 U.S.C. §§ 901–945 ("the Act") and the regulations issued thereunder, which are found in Title 20 of the Code of Federal Regulations. Regulations referred to herein are contained in that Title.[1]

[1]The adjudication of this claim is subject to regulations as amended effective January 19, 2001. 20 C.F.R. § 718.2 (2001). Unless otherwise indicated, citations are to the regulations as amended.

Benefits under the Act are awarded to coal miners who are totally disabled within the meaning of the Act due to pneumoconiosis, or to the survivors of coal miners whose death was due to pneumoconiosis. Pneumoconiosis, commonly known as black lung, is a dust disease of the lungs resulting from coal dust inhalation.

On January 6, 2004, this case was referred to the Office of Administrative Law Judges ("OALJ") for a formal hearing. A hearing was scheduled in Pikeville, Kentucky for May 10, 2005. Claimant responded to a notice of the hearing by indicating that he did not intend to represent himself at the hearing. I construed Claimant's correspondence as a request for a decision on the record. Both the Employer and the Director consented to a hearing on the record and Claimant's request was granted in an order dated April 6, 2005 and a schedule was set for the submission of evidence and the filing of closing arguments. The record is now closed. Director's Exhibits DX 1-41 and Employer's Exhibit EX 1-3[2] are hereby admitted into evidence. Claimant has not offered any additional exhibits. The decision that follows is based on an analysis of the record, the arguments of the parties, and the applicable law.

ISSUES

The issues to be adjudicated are as follows:[3]

1. whether Claimant timely filed his claim for benefits;

2. the length of Claimant's coal mine employment;

3. whether Claimant worked as a miner after December 31, 1969;

4. whether Claimant has pneumoconiosis;

5. whether Claimant's pneumoconiosis arose out of his coal mine employment;

6. whether Claimant is totally disabled;

7. whether Claimant's total disability is due to pneumoconiosis; and

8. whether Claimant has established a change in condition pursuant to 20 C.F.R. 725.309.(c) (d).

DX 41.

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[2]In this Decision and Order, "EX" refers to Employer's Exhibits; "DX" refers to Director's Exhibits.

[3]On form CM-1025, Employer also contested the issue of whether it was properly named as the responsible operator in this claim. This issue was withdrawn by counsel for the Employer during Claimant's deposition. EX 4.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. Procedural Background

Claimant's first application for benefits was filed on January 11, 1972 and denied on July 3, 1979. DX 1. His second claim for benefits was filed on August 30, 1989 and denied on July 9, 1993. DX 1. A third claim was filed on March 31, 1995 and denied on September 6, 1995. At the time of this denial, the District Director found that Claimant had not established any of the elements of entitlement. DX 2. The current claim for benefits was filed on April 8, 2002. DX 4. In a Proposed Decision and Order issued on October 1, 2003, the District Director denied benefits. DX 32. Claimant requested a formal hearing in a letter dated October 7, 2003. DX 33.

B. Factual Background

Claimant was born on May 5, 1941. DX 4. He married Sandra Adkins on March 3, 1966, and remains married to her. DX 4; 13. I find that Claimant has one dependent for purposes of augmentation of benefits under the Act.

Mr. Johnson first began working in the coal mines in 1959 and testified at a deposition that he worked fairly regularly until 1989. Coal mine employment was the only type of work that he did. He estimated that he worked about four years of his coal mine employment outside in surface mines and for the Highway Department and said that the rest of his coal mine employment was underground.

Mr. Johnson testified that he last worked in coal mine employment for Freeman Fuels. He worked for Kinney Branch until that company was bought by Freeman in 1988. When the company was bought out, he continued working for the new company and worked there for about 14 months. He worked doing general labor on a surface mine, which included cutting trees, greasing equipment, and running dozers and loaders. He stated that he was exposed to coal, rock and sand dust on the job. He was injured while working for Freeman when a rock truck turned over and his back and neck were injured. Because of his injury, he stopped working in August 1989. He received disability as a result of the injury and in approximately 1993 was awarded social security for a whole body disability. He now does part-time work doing odd jobs as needed.

Claimant testified that he has shortness of breath and that the hot weather makes it worse. He also has trouble walking up hills. He stated that he smoked one pack of cigarettes for about 30 years. He quit smoking in 1989, but started back "a little," then quit finally in 1999.

C. Length of Coal Mine Employment

The District Director determined that Claimant had established 22 years of qualifying coal mine employment. DX 29. In order to calculate the number of years of Claimant's coal mine employment, I refer to § 725.101(a)(32) which provides that a "year" means: "a period of one calendar year (365 days, or 366 days if one of the days is February 29), or partial periods totaling one year, during which the miner worked in or around a coal mine or mines for at least

125 'working days.'" This section also provides that:

> If the evidence establishes that the miner worked in or around coal mines at least 125 working days during a calendar year or partial periods totaling one year, then the miner has worked one year in coal mine employment for all purposes under the Act. If a miner worked fewer than 125 working days in a year, he or she has worked a fractional year based on the ratio of actual number of days worked to 125.

§ 725.101(a)(32)(i).

This section also provides that "to the extent the evidence permits, the beginning and ending dates of coal mine employment shall be ascertained." § 725.101(a)(32)(ii). This section further provides:

> If the evidence is insufficient to establish the beginning and ending dates of the miner's coal mine employment, or the miner's employment lasted less than a calendar year, than the adjudication officer may use the following formula: divide the yearly income from work as a miner by the coal mine industry's average daily earnings for that year, as reported by the Bureau of Labor Statistics (BLS). A copy of the BLS table shall be made part of the record if the adjudication officer uses this method to establish the length of the miner's work history.

§ 725.101(a)(32)(iii).

The Bureau of Labor Statistics does not actually provide the necessary data described in the regulations, therefore, I rely on the BLBA Procedure Manual 2-700.11a and 2-700.14a to determine Claimant's coal mine employment. The table provided in this section indicates the average yearly and average daily earnings for coal miners. I compare this to Claimant's history of earnings from the Social Security records to calculate the length of Claimant's coal mine employment.[4] The application of the above-described formula to the present facts is as follows:

Year	Company	Yearly) daily average earnings (BLBA)	Total# Days/Years
1959	ML Coal Co.	$63.81	
	Little Robinson Creek Coal Co.	$21.00	
	Raven Rock Coal Co.	$21.00	
	Subtotal:	$105.81 ÷ $17.47	6 days
1960	KY-WVA Gas Co.	$55.30	

[4]The BLBA table is incorporated by reference in this Decision and Order.

	Lige Branch Coal Co.	$142.63	
	Subtotal:	$197.93 ÷ $18.13	11 days
1961	Lige Branch Coal Co.	$944.89	
	Richard Coal Co.	$229.20	
	R&K Coal Co.	216.40	
	Subtotal:	$1390.49 ÷ $21.16	66 days
1962	Richardson Mining Co.	$213.81	
	Clyde Tackett Coal Co.	$66.70	
	KY-WVA Gas Co.	$332.80	
	TALP Maggard Coal Co.	$108.75	
	Subtotal:	$722.06 ÷ $21.74	32 days
1963	Roy E & EW Greer	$755.87 ÷ $22.68	33 days
1964	Oney Mining Co.	$145.63	
	Morray Coal Co.	$42.47	
	Carl C. Moore Coal Co.	$918.94	
	Subtotal:	$1107.04 ÷ $24.25	46 days
1965	JN Coal Co.	$148.75	
	Carl C. Moore Coal Co.	$2084.02	
	Subtotal:	2232.77 ÷ $25.78	87 days
1966	Carl C. Moore Coal Co.	$676.57	
	Roy E & EW Greer	$582.65	
	KY Gas Dealers	$460.78	
	Elkhorn & Jellico Coal Inc.	$1556.50	
	Subtotal:	3276.50 ÷ $27.51	119 days
1967	Elkhorn & Jellico Coal Inc.	$4294.88 (Exceeds yearly average)	1 year
1968	Elkhorn & Jellico Coal Inc.	$4964 (Exceeds yearly average)	1 year
1969	Elkhorn & Jellico Coal Inc.	$5864 (Exceeds yearly average)	1 year
1970	Elkhorn & Jellico Coal Inc.	$5803.59 (Exceeds yearly average)	1 year
1971	Elkhorn & Jellico Coal Inc.	$70.53 ÷ $40.07	2 days
1972	Elkhorn & Jellico Coal Inc.	$1053.33	
	Southeast Coal Co. Inc.	$307.59	
	Gannon & Johnson Coal Co.	$949.12	
	Diamond Mining Co.	$202.50	
	Commonwealth Dept. Transportation	$896.80	

	Subtotal:	$3409.34 ÷ $46.61	73 days
1973	Commonwealth Dept. Transportation	$4156.25 ÷ 47.19	88 days
1974	Commonwealth Dept. Transportation	$2103.92	
	Coal Branch Coal Inc.	$1031.25	
	Carl Moore	$8221.86	
	Subtotal:	$9253.11 (Exceeds yearly average)	1 year
1975	Coal Branch Coal Inc.	$2812.50	
	A&T Mining Co. Inc.	$970.00	
	Russell Fork Coal	$4108.72	
	Rita Coal Co.	$3756.80	
	Beth Elkhorn Corp.	$2956.54	
	Subtotal:	$10,847.76 (Exceeds yearly average)	1 year
1976	Beth Elkhorn Corp.	$14, 842.86 (Exceeds yearly average)	1 year
1977	Beth Elkhorn Corp.	$8013.69	
	Pratt Bros. Coal Co. Inc.	$8048.28	
	Subtotal:	$16,061.97 (Exceeds yearly average)	1 year
1978	Elkhorn & Jellico Coal Inc.	$4058.21	
	Wright Coal Co. Inc.	$13,975	
	Crystal Star Coal Co.	$648.35	
	Subtotal:	$18681.56 (Exceeds yearly average)	1 year
1979	Wright Coal Co. Inc.	$18, 525.00	
	Kentucky Elkhorn Coal Co.	$1124.19	
	Subtotal:	$19649.19 (Exceeds yearly average)	1 year
1980	Kentucky Elkhorn Coal Co.	$ 25,900 (Exceeds yearly average)	1 year
1981	Kentucky Elkhorn Coal Co.	$ 21,090 (Exceeds yearly average)	1 year
1982	Kentucky Elkhorn Coal Co.	$ 23,650.52 (Exceeds yearly average)	1 year
1983	Kentucky Elkhorn Coal Co.	$3578.09) $109.76	33 days
1984	Kentucky Elkhorn Coal Co.	$11,991.29 ÷ $118.40	101 days
1985	Kentucky Elkhorn Coal Co.	$10, 023.95 ÷ $122	82 days
1987	Kinney Branch Coal Co.	$22,946 (Exceeds yearly average)	1 year
1988	Kinney Branch Coal Co.	$9603.42	123 days

	Freeman Fuels		$6124.82	
		Subtotal:	$15728.24 ÷ $127.52	
1989	Freeman Fuels		$12,667.92 ÷ $130	97 days
	TOTAL:			**22.00 years**

Based on Social Security and other employment records in evidence, and Claimant's own testimony, I find that he has established 22.00 years in coal mine employment.

Post-1969 Coal Mine Employment

On form CM-1025, the Employer disputes that Claimant worked in coal mine employment after December 31, 1969. Mr. Johnson's social security records, employment records and his testimony all substantiate that he worked in coal mine employment after 1969, having last worked in 1989 for Freeman Fuels. I find, therefore, that Claimant was employed as a coal miner after December 31, 1969.

Timeliness of Claimant's Claim for Benefits

The Employer lists the timeliness of Claimant's claim for benefits as a disputed issue on form CM-1025. The Act provides that, "[a]ny claim for benefits by a miner shall be filed within three years after . . . (1) a medical determination of total disability due to pneumoconiosis." 30 U.S.C. 932 (f). The regulations implementing the Act require that the determination of total disability due to pneumoconiosis is communicated to the miner or a person responsible for the miner's care. § 725.308 (a). Further, the regulations provide a "rebuttable presumption that every claim for benefits is timely filed." § 725.308 (c). The Benefits Review Board ("the Board") addressed this limitations issue in Adkins v. Donaldson Coal Mines, 19 B.L.R. 1-36 (1993).

First, the Board stated that "a 'medical determination' must be rendered by a physician, but may include . . . a state workers' compensation board finding based on medical conclusions . . . ." Id. at 1-41. The Board then stated that § 725.308 requires a written medical report that the administrative law judge finds is reasoned, documented and probative and which indicates total respiratory disability due to pneumoconiosis such that the claimant was aware of the total disability. Id. at 1-42. Further, the Board decided that the phrase "communicated to the miner" requires that the miner receives an actual written report that discloses the miner's disability due to pneumoconiosis. Id. at 1-43. The Board stated that an oral statement to the miner is not sufficient. Id.

During his deposition, Claimant testified that he believes Dr. Hussain was the first doctor who told him that he has black lung disease and that it was around 1972. He also indicated that no doctor has told him after quitting work that he is totally disabled due to black lung. The Employer has not presented any evidence or argument on this issue. A review of the record supports Claimant's testimony. Therefore, I find that the Employer has failed to rebut the presumption that this claim was timely filed.

D. Entitlement

Because this claim was filed after the enactment of the Part 718 regulations, Claimant's entitlement to benefits will be evaluated under Part 718 standards. 20 C.F.R. § 718.2. In order to establish entitlement to benefits under § 718, Claimant must prove that (1) he has a history of coal mine employment; (2) that he has pneumoconiosis; (3) that pneumoconiosis arose out of his coal mine employment; (4) that he is totally disabled; and (5) that his total disability is due to pneumoconiosis. Claimant has the burden of establishing each element of entitlement by a preponderance of the evidence. *Director, OWCP v. Greenwich Collieries*, 512 U.S. 267 (1994).

In addition, Claimant must fulfill the requirements of the subsequent claim provisions of § 725.309(d), which apply to any claim for benefits that is filed more than one year after the denial of a previous claim. Specifically, amended regulation § 725.309(d) provides as follows:

> If a claimant files a claim under this part more than one year after the effective date of a final order denying a claim previously filed by the claimant under this part…the later claim shall be considered a subsequent claim for benefits. A subsequent claim…shall be denied unless the claimant demonstrates that one of the applicable conditions of entitlement…has changed since the date upon which the order denying the prior claim became final. The applicability of this paragraph may be waived by the operator or fund, as appropriate.

§ 725.309(d). This section also provides that "the applicable conditions of entitlement shall be limited to those conditions upon which the prior denial was based." § 725.309(d)(2). In the instant case, Claimant's most recent claim was finally denied on September 6, 1995 because he was unable to establish any element of entitlement. DX 2. Therefore, in order to qualify for benefits, Claimant must establish that there has been a change in his condition since this denial. 20 C.F.R. § 725.309(d)(2). The regulations also provide that when an element of entitlement relates to a claimant's physical condition, he must establish that element by way of new evidence. § 725.309(d)(3). If a claimant is able to establish that element of entitlement, generally speaking, no prior findings shall be binding in the adjudication of the subsequent claim. § 725.309(d)(4).

The amended regulations essentially reflect the position of the United States Court of Appeals for the Sixth Circuit regarding duplicate claims.[5] In *Sharondale Corp. v. Ross,* 42 F.3d 993 (6th Cir. 1994) the Sixth Circuit held:

> [T]o assess whether a material change is established, the ALJ must consider all of the new evidence, favorable and unfavorable, and determine whether the miner has proven at least one of the elements previously adjudicated against him. If the miner

[5] Claimant's last coal mine employment took place in the state of Kentucky, therefore the law of the Sixth Circuit governs this claim. *Shupe v. Director, OWCP*, 12 B.L.R. 1-200, 1-202 (1989) (*en banc*).

> establishes the existence of that element, he has demonstrated, as a matter of law, a material change. Then the ALJ must consider whether all of the record evidence including that submitted with previous claims, supports a finding of entitlement of benefits.

Sharondale, 42 F.3d at 997–998.

SUMMARY OF MEDICAL EVIDENCE

Chest X-rays

The record contains the following newly submitted chest X-ray interpretations:

DATE OF X-RAY	DATE READ	EXHIBIT NUMBER	PHYSICIAN	RADIOLOGICAL CREDENTIALS	I.L.O. CLASSIFICATION
6-5-02	6-5-02	DX 15	Hussain	none	0/1
6-5-02	8-12-02	DX 16	Barrett	BCR, B	Quality reading only; Quality 1
6-5-02	5-13-03	DX 31	Poulos	BCR, B	Negative
6-25-02	6-25-02	EX 1	Rosenberg	B	0/0

Pulmonary Function Studies

The record contains the following newly submitted pulmonary function studies:

DATE	EX. NO.	PHYSICIAN	AGE	FEV_1	MVV	FVC	FEV_1/ FVC	EFFORT	QUALIFIES
6-5-02	DX 15	Hussain	61	2.70 2.60*	80	3.67 3.61*	74% 72%	Good	No
6-25-02	EX 1	Rosenberg	61	2.92	95	4.09	71%	Good	No

*post-bronchodilator

Arterial Blood Gas Studies

The record contains the following newly submitted arterial blood gas studies:

DATE	EXHIBIT NO.	PHYSICIAN	pCO_2	pO_2	QUALIFIES
6-5-02	DX 15	Hussain	37.7 36.7	79 93	No No
6-25-02	EX 1	Rosenberg	36.8	86.4	No

Physician Opinions

The current record contains the following newly submitted physician opinions:

Dr. Imtiaz Hussain (Board-certified in Internal Medicine and Pulmonary Medicine) examined Claimant on June 5, 2002. (DX 15). He noted that Claimant worked for 30 years in coal mine employment and that he smoked about one pack of cigarettes per day from 1954 to 1989. The miner reported complaints of sputum production, wheezing, dyspnea on mild exertion and coughing daily. Dr. Hussain read an X-ray as category 0/1 for pneumoconiosis, but noted in his report that it showed "mild pneumoconiosis." He also performed a pulmonary function study, arterial blood gas studies, and an EKG, which were all normal. Dr. Hussain diagnosed pneumoconiosis based on the X-ray and attributed the disease to coal dust exposure. Dr. Hussain determined that Claimant did not have any type of respiratory impairment and can perform his last coal mine employment from a respiratory standpoint.

Dr. David Rosenberg (Board certified in Internal Medicine, Pulmonary Disease and Occupational Medicine) prepared a consultative report after reviewing a report of an examination he performed on Mr. Johnson on June 25, 2002 and after reviewing other medical reports and X-rays, including Dr. Hussain's report. Dr. Rosenberg indicated that Claimant had a work history of 26 years of coal mine employment, doing various jobs in the mines. His last job was reported to be that of a mine foreman, working on the belt line and running the shuttle car. He also operated a dozer and heavy equipment. Dr. Rosenberg indicated that the miner reported that he started smoking around age 13 or 14 and smoked about a pack of cigarettes per day for about thirty years. Dr. Rosenberg reported that on physical examination, Claimant had equal expansion of the chest with no rales, ronchi or wheezes and no murmurs, gallops or rubs. Dr. Rosenberg reviewed an X-ray which he classified as 0/0. He also performed an arterial blood gas study and a pulmonary function study which were both normal. Based on his examination and review of the medical records, Dr. Rosenberg concluded that the miner does not have medical or legal coal workers' pneumoconiosis. His determination was based on a normal examination and normal test results. He also found that the miner does not have a significant respiratory impairment that would prevent him from performing his last coal mine employment. He noted that although the resting arterial blood gas study showed a mild decrease in PO_2 at times, his exercise PO_2 increased to normal with a normal exercise response. He indicated that the normal exercise response shows the interstitium is intact. He further explained that the lack of airflow obstruction on the pulmonary function study indicates the miner does not have chronic obstructive pulmonary disease. (EX 1). Dr. Rosenberg testified at a deposition and discussed the various physical findings and test results which indicate the presence of lung disease and how the lack of these findings indicated that Mr. Johnson does not have coal workers' pneumoconiosis or a totally disabling respiratory impairment. (EX 3).

Dr. Matthew Vuskovich (Board certified in Occupational Medicine) reviewed the pulmonary function study taken on April 19, 2005. He determined that the pulmonary function study was valid and shows no evidence of obstructive or restrictive pulmonary disease. He also reviewed the arterial blood gas study taken on that date and found that it showed no diffusion abnormalities. Based on his review of these tests, Dr. Vuskovich determined that Claimant has the respiratory capacity to perform his last coal mine employment. (EX1).

DISCUSSION OF EVIDENCE

A. Presence of Pneumoconiosis

Section 718.201 defines pneumoconiosis as "a chronic dust disease of the lung and its sequelae, including respiratory and pulmonary impairments, arising out of coal mine employment" and "includes both medical, or 'clinical', pneumoconiosis and statutory, or 'legal', pneumoconiosis." Sections 718.201(a)(1) and (2) define clinical pneumoconiosis and legal pneumoconiosis. Section 718.201(2)(b) provides that a disease "arising out of coal mine employment" includes:

> any chronic pulmonary disease or respiratory or pulmonary impairment significantly related to, or substantially aggravated by, dust exposure in coal mine employment.

Section 718.201(2)(c) provides that pneumoconiosis "is recognized as a latent and progressive disease which may first become detectable only after the cessation of coal mine dust exposure."

There are four means of establishing the existence of pneumoconiosis, set forth at § 718.202(a)(1) through (4):

1. X-ray evidence. § 718.202(a)(1).

2. Biopsy or autopsy evidence. § 718.202(a)(2).

3. Regulatory presumptions. § 718.202(a)(3).

   (a) § 718.304—Irrebuttable presumption of total disability due to pneumoconiosis if there is evidence of complicated pneumoconiosis.

   (b) § 718.305—Where the claim was filed before January 1, 1982, there is a rebuttable presumption of total disability due to pneumoconiosis if the miner has proven fifteen (15) years of coal mine employment and there is no other evidence demonstrating the existence of a totally disabling respiratory or pulmonary impairment.

   (c) § 718.306—Rebuttable presumption of entitlement applicable to cases where the miner died on or before March 1, 1978, and was employed in one or more coal mines prior to June 30, 1971.

4. Physicians' opinions based upon objective medical evidence. § 718.202(a)(4).

In weighing the evidence falling within these subsections, the Benefits Review Board has noted that the U.S. Court of the Appeals for the Sixth Circuit "has often approved the independent application of the subsections of § 718.202(a) to determine whether claimant has established the existence of pneumoconiosis." *Furgerson v. Jericol Mining, Inc.*, 22 B.L.R. 1-216 (2002) (*en banc*).

Chest X-ray evidence § 718.202(a)(1)

Pursuant to § 718.202(a)(1), the existence of pneumoconiosis can be established by chest X-rays conducted and classified in accordance with § 718.102. It is well-established that the interpretation of a chest X-ray by a B-reader may be given additional weight by the fact-finder. *Aimone v. Morrison Knudson Co.*, 8 B.L.R. 1-32, 34 (1985); *Martin v. Director, OWCP*, 6 B.L.R. 1-535, 537 (1983); *Sharpless v. Califano*, 585 F.2d 64, 666–67 (4th Cir. 1978). The Board has also held that the interpretation of a chest X-ray by a physician who is a B-reader as well as a Board-certified radiologist may be given more weight than that of a physician who is only a B-reader. *Zeigler Coal Co. v. Kelley*, 112 F.3d 839, 842–43 (7th Cir. 1997); *see also Bethenergy Mines, Inc. v. Cunningham,* Case No. 03-1561 (4th Cir. July 20, 2004) (unpub.). In addition, the judge is not required to accord greater weight to the most recent X-ray evidence of record, but rather, the length of time between the X-ray studies and the qualifications of the interpreting physicians are factors to be considered. *McMath v. Director, OWCP*, 12 B.L.R. 1-6 (1988); *Pruitt v. Director, OWCP*, 7 B.L.R. 1-544 (1984); *Gleza v. Ohio Mining Co.*, 2 B.L.R. 1-436 (1979).

There are three readings of two X-rays in the newly submitted evidence. The X-ray taken on June 5 was interpreted as negative by Dr. Hussain and by Dr. Poulos, who is dually-qualified as both a B-reader and Board Certified Radiologist. The second X-ray, taken on June 25, 2002 was interpreted only as negative by Dr. Rosenberg, who is a B-reader. There are no X-ray interpretations which are positive for pneumoconiosis. Therefore, I find that the X-ray evidence is negative and does not support a finding of pneumoconiosis.

Biopsy or autopsy evidence § 718.202(a)(2)

A determination that pneumoconiosis is present may be based on a biopsy or autopsy. § 718.202(a)(2). That method is unavailable here, because the record contains no such evidence.

Regulatory presumptions § 718.202(a)(3)

A determination of the existence of pneumoconiosis may also be made by using the presumptions provided in §§ 718.304, 718.305, and 718.306. Section 718.304 requires X-ray , biopsy or equivalent evidence of complicated pneumoconiosis, a condition that is not present in this case. Section 718.305 is not applicable because this claim was filed after January 1, 1982. § 718.305(e). Section 718.306 is only applicable in the case of a deceased miner who died before March 1, 1978. Since none of these presumptions is applicable, the existence of pneumoconiosis has not been established under § 718.202(a)(3).

Physicians' opinions § 718.202(a)(4)

The fourth way to establish the existence of pneumoconiosis under § 718.203 is set forth as follows in § 718.202(a)(4):

> A determination of the existence of pneumoconiosis may also be made if a physician exercising sound medical judgment, notwithstanding a negative X-ray , finds that the miner suffers or suffered from pneumoconiosis as defined in § 718.201. Any such finding shall be based on objective medical evidence such as blood gas studies, electrocardiograms, pulmonary function studies, physical performance tests, physical examination, and medical and work histories. Such a finding shall be supported by a reasoned medical opinion.

§ 718.202(a)(4).

Dr. Hussain diagnosed pneumoconiosis, based on what he referred to as a "positive" X-ray. However, his actual interpretation of the film was 0/1, which is a negative reading for the presence of pneumoconiosis. Although a designation of 0/1 but indicates some possible abnormalities, according to the ILO classifications that are accepted in the prevailing regulations, such a finding is not technically a positive reading. Dr. Hussain did not give any further explanation for his diagnosis. Because of this unexplained discrepancy in the X-ray reading and the lack of reasoning to support his diagnosis, I must give less weight to his conclusion.

Dr. Rosenberg found no evidence to support a diagnosis of pneumoconiosis or any coal mine employment related disease. He gave support for his determinations, which he based on normal test results. Dr. Rosenberg further explained the types of findings on examination and testing which would be diagnostic of pneumoconiosis and how none of the findings were present on Claimant's examination or test results. I find Dr. Rosenberg's determinations well-reasoned and well-documented. Dr. Rosenberg's opinion is entitled to substantial weight. Therefore, after weighing the two medical opinions, I find that Claimant is unable to establish the presence of pneumoconiosis.

B. Pneumoconiosis Arising Out of Coal Mine Employment

Section 718.203(a) provides that in order to be entitled to benefits, Claimant must show that his pneumoconiosis "arose at least in part out of coal mine employment." § 718.203(a).

As Claimant is unable to establish the presence of pneumoconiosis, I find that this issue is moot.

C. Total Respiratory Disability

In order for Claimant to prevail, he must establish that he is totally disabled due to a respiratory or pulmonary condition. Total disability is defined in § 718.204(b)(1) as follows:

> A miner shall be considered totally disabled if the miner has a pulmonary or respiratory impairment which, standing alone, prevents or prevented the miner (i) [f]rom performing his or her usual coal mine work; and (ii) [f]rom engaging in [other] gainful employment in a mine or mines.

§ 718.204(b)(1). Nonpulmonary and nonrespiratory conditions that cause an "independent disability unrelated to the miner's pulmonary or respiratory disability" have no bearing on total disability under the Act. § 718.204(a); *see also Beatty v. Danri Corp.*, 16 B.L.R. 1-1 (1991), *aff'd as Beatty v. Danri Corp. & Triangle Enterprises*, 49 F.3d 993, 1000 (3d Cir. 1995). Finally, § 718.204(a) also provides that:

> If, however, a non-pulmonary or non-respiratory condition or disease causes a chronic respiratory or pulmonary impairment, that condition shall be considered in determining whether the miner is or was totally disabled [under the Act].

§ 718.204(a).

Claimant may establish total disability in one of four ways: pulmonary function study; arterial blood gas study; evidence of cor pulmonale with right-sided congestive heart failure; or reasoned medical opinion. § 718.204(b)(2)(i–iv). A presumption of total disability is not established by a showing of evidence qualifying under a subsection of § 718.204(b)(2), but rather such evidence shall establish total disability in the absence of contrary evidence of greater weight. *Gee v. W.G. Moore & Sons*, 9 B.L.R. 1-4 (1986). All medical evidence relevant to the question of total disability must be weighed, like and unlike together, with Claimant bearing the burden of establishing total disability by a preponderance of the evidence. *Rafferty v. Jones & Laughlin Steel Corp.*, 9 B.L.R. 1-231 (1987). There is no evidence of cor pulmonale with right-sided congestive heart failure in this case. Therefore, total disability analysis is based on pulmonary function studies, arterial blood gas studies, and physician opinions.

Pulmonary Function Studies at 20 C.F.R. § 718.204(b)(2)(i)

In order to demonstrate total respiratory disability on the basis of pulmonary function study evidence, a claimant may provide studies, which, after accounting for sex, age, and height, produce a qualifying value for the FEV_1 test, and produce either a qualifying value for the FVC test or the MVV test, or produce a value of FEV_1 divided by the FVC less than or equal to 55 percent. "Qualifying values" for the FEV_1, FVC, and the MVV tests are measured results less than or equal to values listed in the appropriate tables of Appendix B to 20 C.F.R. Part 718, 20 C.F.R. § 718.204(b)(2)(i). *Director, OWCP v. Siwiec*, 894 F.2d 635, 637 n.5, 13 B.L.R. 2-259 (3d Cir. 1990). Assessment of pulmonary function study results is dependent on Claimant's height, which was listed most frequently as approximately 68 inches. *Protopappas v. Director, OWCP*, 6 B.L.R. 1-221 (1983).

Of the two pulmonary function studies of record, neither produced qualifying results. Therefore, I find that the pulmonary function studies of record do not support a finding of total

pulmonary disability.

Arterial Blood Gas Studies at 20 C.F.R. § 718.204(b)(2)(ii)

Pursuant to § 718.204(b)(2)(ii), total disability can also be established by qualifying arterial blood gas studies.

The two arterial blood gas studies in the record produced non-qualifying results. I find that the arterial blood gas studies of record do not support a finding of total pulmonary disability.

Physician Opinion Evidence at 20 C.F.R. § 718.204(b)(2)(iv)

Based on his review of the pulmonary function study tests, Dr. Vuskovich determined that Claimant has the respiratory capacity to perform his last coal mine employment. (EX 1). I find Dr. Vuskovich's determinations well-documented and well-reasoned and afford his report probative weight. Likewise, Drs. Hussain and Rosenberg both found that Claimant is not totally disabled from a respiratory standpoint, based on the objective medical testing. As there are no medical reports diagnosing a totally disabling respiratory impairment, Claimant has not established pneumoconiosis by this method.

Considering all of the evidence related to the issue of disability, I find that Claimant has not established that he is totally disabled from a respiratory standpoint.

D. Total Disability Due to Pneumoconiosis

Claimant bears the burden of proving that pneumoconiosis is a substantial contributor to a miner's total respiratory disability. 20 C.F.R. § 718.204(c)(1). Sections 718.204(c)(1)(i) and (ii) provide that pneumoconiosis is a "substantially contributing cause" of the miner's disability if it:

> (i) Has a material adverse effect on the miner's respiratory or pulmonary condition; or
>
> (ii) Materially worsens a totally disabling respiratory or pulmonary impairment which is caused by a disease or exposure unrelated to coal mine employment.

20 C.F.R. § 718.204(c)(1)(i), (ii). Disability due to pneumoconiosis may be established by a documented and reasoned medical report. § 718.204(c)(2). The U.S. Court of the Appeals for the Sixth Circuit has held that a claimant must show that pneumoconiosis is more than an "infinitesimal" factor in the miner's total disability. *Peabody Coal Co. v. Smith*, 127 F.3d 504, 507 (6th Cir. 1997).

I find that this issue is moot because Claimant is unable to establish that he has pneumoconiosis or that he is totally disabled.

CONCLUSION

Based on the foregoing, Claimant is unable to establish entitlement to benefits.

ORDER

The claim of Gene B. Johnson for benefits under the Act is hereby DENIED.

A

Janice K. Bullard
Administrative Law Judge

Cherry Hill, New Jersey

NOTICE OF APPEAL RIGHTS: If you are dissatisfied with the administrative law judge's decision, you may file an appeal with the Benefits Review Board ("Board"). To be timely, your appeal must be filed with the Board within thirty (30) days from the date on which the administrative law judge's decision is filed with the district director's office. *See* 20 C.F.R. §§ 725.458 and 725.459. The address of the Board is: Benefits Review Board, U.S. Department of Labor, P.O. Box 37601, Washington, DC 20013-7601. Your appeal is considered filed on the date it is received in the Office of the Clerk of the Board, unless the appeal is sent by mail and the Board determines that the U.S. Postal Service postmark, or other reliable evidence establishing the mailing date, may be used. *See* 20 C.F.R. § 802.207. Once an appeal is filed, all inquiries and correspondence should be directed to the Board.

After receipt of an appeal, the Board will issue a notice to all parties acknowledging receipt of the appeal and advising them as to any further action needed.

At the time you file an appeal with the Board, you must also send a copy of the appeal letter to Donald S. Shire, Associate Solicitor, Black Lung and Longshore Legal Services, U.S. Department of Labor, 200 Constitution Ave., NW, Room N-2117, Washington, DC 20210. *See* 20 C.F.R. § 725.481.

If an appeal is not timely filed with the Board, the administrative law judge's decision becomes the final order of the Secretary of Labor pursuant to 20 C.F.R. § 725.479(a).